Supreme Court, U.S.
FILED

09-832 NOV 12 2009

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

Oscar L. Thomas, Pro Se

Petitioner,

v.

R. James Nicholson, Secretary, United States Department of Veterans Affairs, in his Individual Capacity, et al

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the District of Columbia Circuit

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APPENDIX A TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A - TO WRIT OF CERTIORARI

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5138 September Term 2008
1:07-cv-00598-RJL
Filed On: August 19, 2009

Oscar L. Thomas,
Appellant

v.

R. James Nicholson, Secretary, Department of Veterans Affairs, in his individual capacity, et al.,

Appellees

BEFORE: Sentelle, Chief Judge, and Ginsburg and Garland, Circuit Judges

ORDER

Upon consideration of the motions for appointment of counsel; the motion to expedite, for summary reversal and remand with instructions, the opposition thereto, and the reply; and the motion for summary affirmance and the response thereto, it is

ORDERED that the motions for appointment of counsel be denied. With the exception of defendants appealing or defending in criminal cases, appellants are not entitled to appointment of counsel when they have not demonstrated sufficient likelihood of success on the merits. It is

FURTHER ORDERED that the motion for remand be denied. It is

FURTHER ORDERED that the motion for summary affirmance be granted and the motion for summary reversal be denied. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam). The district court properly dismissed the action against the judges because they are absolutely immune from liability for damages for actions taken in the course of their official capacities. See Mirales v. Waco, 502 U.S. 9 (1991) (absolute immunity for judges from damages for acts committed in their judicial capacities). It is

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 09-5138 September Term 2008

FURTHER ORDERED that the motion to expedite be dismissed as moot.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. See Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
333 Constitution Avenue, NW
Washington, DC 20001

Oscar L. Thomas	)	
	)	
- Plaintiff,	)	
	)	
v.	)	Civil Action # 02-0598 (RJL)
	)	
R. James Nicholson et al	)	
	)	
- Defendants.	)	
	)	

MEMORANDUM ORDER
December 11, 2008

Plaintiff Oscar L, Thomas, pro se, filed a second amended complaint on December 6, 2008. Included in that complaint are claims under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against Judge Ellen S. Huvelle and Rosemary M. Collyer and Magistrate Judges Deborah A. Robinson and Alan Kay, all of whom sit on this Court. For the reasons below, the Court DISMISSES the complaint against the above-named defendant judges for lack of subject matter jurisdiction. Fed.R.Civ. 12(h)(3) ("if the court determines at any time it lacks subject-matter jurisdiction, the court must dismiss the action.").

Judges are absolutely immune from damage suits for the performance of judicial acts. *Forrester v. White*, 484 U.S. 219, 227 (1988). A judge clearly acts within the scope of his immunity when she "resolve[s] disputes between the parties who have invoked the jurisdiction of a court[.] *Forrester v.*

White, 484 U.S. 227. While a judge is no longer immune from suit if she acts "in the clear absence of all jurisdiction," *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978), such is not the case here. All the conduct complained of by plaintiff stems from a lawsuit he filed under the Federal Tort Claims Act. The district court clearly had jurisdiction over this federal question, 28 U.S.C. § 1331, and the judges' various decisions in that lawsuit fell within the definition of judicial acts. Plaintiff's remedy for his dissatisfaction with the judges' ruling lies with the appeals process, not the lawsuit now before this Court.[9]

Therefore, it is hereby

ORDERED that the amended complaint is dismissed with respect to the defendants Huvelle, Collyer, Robinson, and Kay.

SO ORDERED.

/s/
RICHARD J. LEON
United States District Judge

[9] Plaintiff requests remedies other than damages, such as injunctions and declaratory judgments. However, under *Bivens*, "its is damages or nothing." Davis v. Passman, 442 U.S. 228, 245 (1979) (citations and internal quotation marks omitted). Plaintiff requests for equitable relief therefore do not prevent this Court from dismissing the complaint for lack of subject matter jurisdiction.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
333 Constitution Avenue, NW
Washington, DC 20001

Oscar L. Thomas	)	
	)	
- Plaintiff,	)	
	)	
v.	)	Civil Action # 02-0598 (RJL)
	)	(ECF)
R. James Nicholson, Secretary,	)	
DVA, et al	)	
	)	
- Defendants	)	
	)	

MOTION FOR RECONSIDERATION OF COURT'S MEMORANDUM ORDER OF DISMISSAL, TO REVERSE, VACATE AND RESTORE DEFENDANTS TO COMPLAINT, OR IN THE ALTERNATIVE FOR LEAVE OF THE COURT TO FILE THIRD AMENDED COMPLAINT NAMING JUDGE RICHARD J. LEON (RJL) AS A DEFENDANT AND TO REASSIGN CASE, OR IN THE ALTERNATIVE TO CERTIFY AND JOIN

COME NOW the Pro Se Plaintiff, Oscar L. Thomas, herein by motion, respectfully, pursuant to the Federal Rules of Civil Procedure, requesting the Court to grant Plaintiff "[a] Motion pursuant to Fed. R. Civ. P. 59(e) to Alter or Amend Judgment and for Reconsideration of the Court's Memorandum Order, dated December 11, 2008, [Dkt. # 38], of dismissal, dismissing Plaintiff's complaint against defendant District Court Judges, Ellen S. Huvelle and Rosemary M. Collyer, and Magistrate Judges Deborah A. Robinson and Alan Kay and from this complaint based on a lack of subject matter jurisdiction pursuant to Fed. R. Civ. P., Rule 12(h)(3) ("if the

court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss he action'). See Court's Memo. Order at 1. In support of this motion Plaintiff submit the below Memorandum of Points and Authorities. Attempts to contact and obtain defendants position on this motion were unsuccessful.

MEMORAANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR RECONDISERATION OF COURT'S MEMORANDUM ORDER OF DISMISSAL, TO REVERSE, VACATE AND RESTORE DEFENDANTS TO COMPLAINT, OR IN THE ALTERNATIVE FOR LEAVE OF THE COURT TO FILE THIRD AMENDED COMPLAINT NAMING JUDGE RICHARD J. LEON (RJL) AS A DEFENDANT AND TO REASSIGN CASE, OR IN THE ALTERNATIVE TO CERTIFY AND JOIN

I. BACKGOUND

Plaintiff Oscar Thomas is a retired Army veteran has rightfully and routinely sought veteran's benefits from the Department of Veterans Affairs ("VA") for physical and mental health conditions that he believes and the Department has found are connected to Plaintiff's 25 years of military and war-time service.

In this case, Plaintiff, Pro Se has brought and stewarded his own case, and as a last resort and after administrative efforts failed, initially sues Mr. Principi, the Secretary, DVA at that time. Plaintiff restates and alleges that this Court, as it has previously done in this case, has once again, erroneously dismissed Plaintiff's claims and complaint due to its obvious erroneous findings, clear errors, and of a lack of subject-matter or authority under the FTCA framework, which it has never had from the outset. On its false and unauthorized acts of authority, this Court, for the past 6 years has, unmercifully and without any fairness, authority or regard for Plaintiff's constitutionally guaranteed protected legal and due process rights, or any sense of fairness, has continually denied Plaintiff this fairness and due process of law, and without any jurisdictional authority, has for these 6 full years, continuously kicked Plaintiff case down the road of injustice for this whole unjustifiable 6 years. In a separate action (07cv0598), Plaintiff

has file an original, first and second amended complaint District Court Judges and a number of other defendants in their individual capacity on claims alleged in the referenced complaints.

On December 11, 2008, before any answer or responsive pleading was file by any defendant in this case, the presiding Honorable Judge, Richard J. Leon, hereafter ("RJL") issued Memorandum Order, dismissing the named defendant judges from the action. Plaintiff disagrees and objects to the Court's Memorandum Order.

CONTENTIONS

Plaintiff's requests the Court reconsider and reverse its Memorandum Order of Dismissal, dismissing named Judges because: (1) the Court's findings of fact and application of law concerning the judges' judicial acts verses their acting absent of "all jurisdiction", to include, jurisdiction over the subject-matter, which are completely and totally erroneous and not taken in accordance with law and Supreme Court Precedence, (2) because the Court's Dismissal Order constitutes bias, partiality, frustration of effort, denial and access to justice and the courts, and is a denial of Constitutional Due Process, (3) because Plaintiff alleged, pointed to and present to the Court on the face of the Amended Complaint, claimed allegations, which the Court totally disregarded, which clearly establishes the Court's lack of "all jurisdiction" in the subject FTCA claim over which it contend and rule that the judges' actions were all "judicial acts", (4) because reconsideration is "need to correct clear error and manifest injustice", and (5) because, although Plaintiff acted to avoid the current outcome before a final order of dismissal had been entered, the Court, nonetheless issued it order sau sponte with disregard and without consideration of the key facts and the application of the applicable law to those facts; before any defendant had ever

filed answer or responsible pleading to the complaint claiming any claim or defense to the action.

Extreme caution should be exercised in ordering *sua sponte* dismissal of a *pro se* complaint before the adverse party has been served and the parties have had an opportunity to respond, *Anderson v. Coughlin*, 700 F.2d 37, 41 (2d Cir. 1983). "[J]udges enjoy ***absolute immunity*** from personal liability for 'acts committed within their judicial jurisdiction.'" *Young v. Selsky*, 41 F.3d 47, 51 (2d Cir. 1994) (emphasis added) (quoting *Pierson v. Ray*, 386 U.S. 547 (1967)).

ARGUMENT

For these reasons and the arguments presented below, Plaintiff believes the Court's statement of the facts, legal findings and Memorandum Order of Dismissal of December 11, 2008, relating to the Court's findings that it lack "subject-matter jurisdiction" over Plaintiff's claims against these "sitting judges", denies Plaintiff Due Process and access to justice and to the court, is simply "dead wrong". 28 U.S.C. § 1331.

In this present case once one has observed the true facts and looked into the authorities, it is clear, from them, as well as from the principle on which any immunity and lack of subject matter jurisdiction is claimed or maintained, that the Court has erred, because the qualifying words used ("judicial acts") were not necessary to a correct statement of the law, and that judges of courts of "limited jurisdiction" are indeed, liable to civil actions for their claimed alleged "judicial acts", specifically, when in fact, they have acted without all jurisdictional subject matter authority, because, all such acts are/were in excess of any and "all" jurisdiction they are attempting to claim they acted under....there is "the clear absence of all jurisdiction - over the subject matter." Where there is clearly no jurisdiction over, (U.S. Supreme Court Bradley v. Fisher, 80 U.S. 13 Wall. 335 (1871), (Page 80 U. S.

352), [the subject matter and authority exercised is a usurped authority], [and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible]. But where jurisdiction over the subject matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, (specific subject-matter), should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, (as here, "its judges"), his commission would afford no protection to him in the exercise of the usurped authority. But, if on the other hand a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject matter is invoked.

However, here, this is not the case. District Courts are not courts of "general jurisdiction", but courts of limited jurisdiction. In this Supreme Court case, the Court went on to find that, "Indeed some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be

of this immunity when she resolve[s] disputes between the parties who have [invoked] the jurisdiction of the court[.] Since, in this case, no party [invoked] the subject-matter jurisdiction of this Court as required by a Federal Statue, [28 U.S.C. § 2679(b)-et seq.] in the referenced case, [this Cour[t], ha[d] no jurisdictional authority "at all" to ac[t]. Thus, the judges must answer to Plaintiff's complaint. The underlying factual allegations described conduct on the face of the complaint outside the scope of the named Judges' office, employment and jurisdictional authority.

The judges' and the Court's persistence in making rulings and orders against Plaintiff in this case, without "all jurisdiction", is a willful and known frustration and a continued frustration of Plaintiff's efforts on their part of Plaintiff's absolute legal and constitutional rights to access to justice and the court[s], as alleged herein and in the captioned original and amended complaints, which has caused and continues to cause grave injury and prejudice to the Plaintiff, and it renders the defendants and the defendant Judges liable to answer in damages for their acts at the uit of the plaintiff.....(where there is clearly no jurisdiction over, ["*the subject matter*"], (U.S. Supreme Court Bradley v. Fisher, 80 U.S. 13 Wall. 335 (1871), (Page 80 U. S. 352), any authority exercised [is a usurped authority], and for the exercise of such authority, when the want of jurisdiction is known to the judge or judges, no excuse is permissible)(no immunity is available).

Here, clearly, when the want of jurisdiction wa[s] known to the judges to be lacking, (which Plaintiff pointed out to them constantly), which they all knew was and is still lacking for their acts and omissions, they all each exercised a usurped authority and so, [any authority exercised by any one and/or all of them, is/was a usurped authority], [and for their exercise of such authority, when the want of jurisdiction is/was known to them, [the judge or judges], no excuse is permissible], e.g., (he, she, they are no[t] immune). (A judge is no longer immune from suit if she acts "in the clear absence of all jurisdiction,"

Stump v. Sparkman, 435 U.S. 349, 356-57 (1988). The Court thus had Article III subject matter jurisdiction to consider plaintiff's claims against the judges because they do meet the "bedrock" constitutional requirement that they present a justiciable "case or controversy" for this Court's decision. 28 U.S.C. § 1331.

While it is both logical and practicable for the Court to determine whether the plaintiff has stated claims justiciable under Article III of the Constitution before addressing, or requiring the defendants to address, the merits of those claims, however, immunity is a defense that must be claimed and not sau sponte granted or awarded to defendants by the Court sau sponte and/or on a motion for extension of time to file initial response to the action.

The Court and the Judges' contentions that, "All the conduct complained of by Plaintiff stems from a lawsuit he filed under the FTCA", that "the district court clearly had jurisdiction over this federal question, 28 U.S.C. § 1331", and "the judges' various decisions in that lawsuit fell within the definition of judicial acts", and that, "Plaintiff's remedy for his dissatisfaction with the judges' rulings lies with the appeals process[2], not the lawsuit before this court". This is a

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[2]However, here, on the primary underlying issue/question, that the Honorable RJL is attempting to re-answer sau sponte in his dismissal Order, e.g., whether, "All the conduct complained of by Plaintiff stems from a lawsuit he filed under the FTCA", "the district court clearly had jurisdiction over this federal question, 28 U.S.C. § 1331, and the judges' various decisions in that lawsuit fell within the definition of judicial acts", and that, "Plaintiff's remedy for his dissatisfaction with the judges' rulings lies with the appeals process, not the lawsuit before this court", showing that "the district court clearly had *no* subject-matter jurisdiction over this federal question under 28 U.S.C. § 1331", and "the judges' various decisions in that lawsuit fell within the definition of judicial acts", has already been asked and is currently before Appellate Court. See appeal of Plaintiff in DC Civil Action # 02cv1743, DC Appellate Court # 08-5349. This Court exercised a usurped authority in attempting to decide this issue that is for and now before that DC Appellate Court.

continuous injury and prejudice to Plaintiff by the judges' in their denial of justice and Plaintiff's constitutional guaranteed protected right of access to the court(s), and is a lack of and absence of any showing on the defendants' judges part that "the district court clearly had jurisdiction over this "federal question", 28 U.S.C. § 1331"[3], and "the judges' various decisions issued in that lawsuit (02cv1743) fell within the definition of judicial acts", which are all based on [a usurped authority]; because, no statutory jurisdiction of an Article III case attached at the outset of a case, and subsequent events do not destroy it because it never existed.[4] The court may dismiss a complaint for lack of subject-matter jurisdiction *only* if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Empagran S.A. v. F. Hoffman-Laroche, Ltd.*, 315 F.3d 338, 343 (D.C. Cir. 2003) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). Because the Judges were not performing "judicial acts" within Art. III's subject-matter jurisdictional authority and are not immune from the plaintiff's claims, the court ***exercises subject matter jurisdiction*** over Plaintiff's (07cv0598) captioned complaint and claims against them.

Each of the named Judges have exercised a usurped authority, based on the *Bivens* complaint allegations of the

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[3] Because, in this case, what gives the Art. III Court and the Judges their subject-matter jurisdictional authority is not 28 U.S.C. § 1331, but the U.S. Attorneys scope of employment certifications required by 28 U.S.C. § 2679(b)-et seq. Absent this § 2679(b) "subject-matter jurisdictional authority", the Court exercised a usurped authority.

[4] Thus, as the Court of Appeals has recognized, "resolving a merits issue while subject-matter is in doubt 'carries the court beyond the bounds of authorized judicial action' . . . and violates the principle that 'the first and fundamental question is that of jurisdiction. In re Minister Papandreou, 139 F.3d 247, 254-55 (D.C. Cir. 1998) (citations omitted); accord Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583 (1999) ("Article III generally requires a federal court to satisfy itself of its jurisdiction over the subject matter before it considers the merits of the case. . . ").

Judges prohibited rulings relating to VA benefit claims and subsequent rulings on "Plaintiff's failure to exhaust administrative remedies in the underlying the Federal Tort Claims Act ("FTCA") Claim, 28 U.S.C. §§ 1346(b), 2671 *et seq.*,[5] framework in that case and on request for reconsideration, which this Court cited as "jurisdictional", and after having this Civil Action (02cv1743) pending before it from August 30, 2002 to 2008, or 6 years], which Plaintiff believe is [an obstruction of justice]; and further, a denial of reconsideration of the Opinion granting Defendant(s) summary judgment on the claims surrounding the failure of Memphis VAMC to provide medical attention to Plaintiff in November 2002, based on (1) the Court's findings of fact concerning when Plaintiff's October 2001, 2002 and 2003 claims accrued, which were clearly erroneous; (2) the Court's factual and legal findings relating to Due Process and here [access to justice and the Courts], procedural history, analysis, conclusions and application of law, (3) to point and present to the Court, raised arguments and/or to present evidence that was raised prior to the entry of judgment, but not considered, (4) the "need to correct clear error and manifest injustice", and (5) because, although Plaintiff acted to avoid the current outcome before a final order had been entered, the Court, nonetheless issued it order without consideration of many of the key facts and the application of law to those facts, and Plaintiff believes the Court's legal findings relating to Due Process, and that the Court's current judgment is "dead wrong"; for one reason, because due to its using [a usurped authority] for its various rulings. See Court Docket Number (Dkt.) in 02cv743, Dkt.'s # 155, 156 and 157, the Court's

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[5]The Court acted without constitutional authority (Art. III as well as a statutory requirement) when it acted without the U.S. Attorney issuing "scope of employment certifications" giving the Court its "subject-matter jurisdiction" to act. Acting without subject-matter jurisdiction, all of its actions and rulings are a nullity.

Memorandum and Order granting [Dkt. # 121] Defendant's Motion to Dismiss and for Summary Judgment and denying [145] Plaintiff's Motion to Strike; and denying all other pending motions are denied as moot, signed by Judge Rosemary M. Collyer on 3/20/08. See also Plaintiff's Memorandum in Support of Motion for Reconsideration, Dkt # [159] re Dkt. # [157] Order, Dkt. # [155] Memorandum & Opinion, signed by Judge Rosemary M. Collyer on 3/20/08, are incorporated and referenced as support as fully set fort herein, and attached as Exhibit A hereto..

In sum, because Plaintiff claims regarding Plaintiff 2001, 2002, and 2003 alleges and/are continuing torts violations under DC law, and the Court, using [a usurped authority] [a nonexistent subject-matter jurisdiction] for its various referenced rulings, erroneously and unlawfully applied the wrong standard in adjudicating and resolving Plaintiff claims and case on summary, as to all of plaintiffs' 2001, 2002 and 2003 FTCA claims, they were not time-barred, and defendant's motion to dismiss, based on the Judges' and the Court's exercise of usurped authority, must be reverse and denied as invalid, null and void ab initio - with judgment rendered in favor of the Plaintiff. As to the honorable RJL's Sua Sponte Memorandum Order of Dismissal, Plaintiff herein alleges and charges, is a known, intentional and willful continued conspiracy to join and to support and continues to aid the alleged conspiracy and unlawful acts, omissions and actions of the Judges and other named and un-named defendants in this and related cases and constitutes obvious bias and a lack of impartiality, and Plaintiff also herein ask the current presiding Honorable RJL to respectfully recuse himself from this case, because of his obvious bias, lack of impartiality and conflict of interest in sau sponte dismissing only his colleague Judges, and to do this without Plaintiff's supporting affidavit, or as under a normal substitution. 28 U.S.C. (the judicial code) with respect to court proceedings provides two sections of providing standards for judicial

disqualification or recusal. Under 28 U.S.C. § 455, captioned Disqualification of justice, judge, or magistrate judge," provides that a federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The same section also provides that a judge is disqualified "where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding", e.g., [facts pertaining to Plaintiff's FTCA claims and the judges' claimed usurped authority rulings] and [Plaintiff's district court and appellate court complaint allegations] on the issue of this Court's subject-matter jurisdictional authority to act in this and the subject FTCA claim]]; when the judge has previously served as a lawyer or witness concerning the same case or has expressed an opinion concerning its outcome, e.g., [the Honorable Judge RJL's Memorandum Order of Dismissal Ruling]; or when the judge or a member of his or her immediate family has a financial interest in the outcome of the proceeding. 28 U.S.C. §144, captioned "Bias or prejudice of judge," provides that under circumstances, when a party to a case in a United States District Court files a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of an adverse party," the case shall be transferred to another judge. The Judge's Memorandum Order of Dismissal, dismissing the named judge defendants in this action should be reconsidered, overturned or reversed and the named judges' should be restored and remain defendants in this case.

CONCLUSION

For all the foregoing and following reasons, the court should (1) Grant the Plaintiff's motion for reconsideration of the Court's Memorandum Order of Dismissal, (2) Reverse or Vacate the Order and Restore Defendant Judges as Defendants to the Complaint, or in the Alternative, (3) Grant

Plaintiff Leave of the Court to File Third Amended Complaint Naming the Honorable Judge (RJL) as a Defendant, (4) Reassign the Case to Another Judge who will act with bias or prejudice, or in the Alternative, (5) Certify this Case for Appeal to be Joined With a Related Case Already on Appeal to the United States Court of Appeals for the District of Columbia Circuit, Case # 08-5349; because the named United States Judges are not immune from the plaintiff's claims, under our U.S. Constitution, "*Bivens*" and Federal Statue 28 U.S.C. § 1331, (the court shall have subject matter jurisdiction). The Court's application of Rule 12(h)(3), Federal Rule Civil Procedure, to the facts of this case was inappropriate, based on (3) "whenever it appears that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Respectfully Submitted,

-S-

December 20, 2008

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1 Attachment: Exhibit A, as

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December 2008, I caused a copy of Plaintiff above Motion for Reconsideration to Alter or Amend the Court's Memorandum Order of Dismissal, dated December 11, 2008, to be served on the following individual:

ROBIN M. MERIWEATHER, D.C. Bar # 490114 via ECF and E-mail

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Oscar L. Thomas	)	
	)	
- Plaintiff,	)	
	)	
v.	)	Civil Action # 02-0598 (RJL)
	)	
R. James Nicholson et al	)	
	)	
- Defendants.	)	

MEMORANDUM OPINION
(September 25, 2009 [#45]

Before the Court is defendants' Motion to Dismiss. Plaintiff Oscar Thomas ("Thomas" or "Plaintiff"), proceeding *pro se*, opposes the motion. Because Thomas has failed to state any actionable claims, defendants' motion must be GRANTED.

BACKGROUND

By now this Court is quite familiar with Thomas and the claims he seeks to pursue. Thomas is a retired Army veteran who has repeatedly sought benefit payments from the Department of Veterans Affairs ("VA") and has already sued the VA once before.[1] In 2002, Thomas filed a complaint against the Secretary of VA based on a 1991 visit to a VA doctor and subsequent visits to the VA Medical Center. *See Thomas v.*

[1] Plaintiff seeks to sue, among others, the Secretary of the Department of Veterans Affairs. Pursuant to Federal Rule of Civil Procedure 25(d), if a public officer named as a party to an action in his official capacity ceases to hold office, the court substitutes Eric K. Shinseki for his predecessor, the previously-named defendant, Oscar Nicholson.

Nicholson, 539 F. Supp. 2d 205, 208 (D.D.C. 2008) (Collyer, J.) ("the FTCA litigation"). My colleagues' dismissal of that complaint is the subject of this suit.

The crux of Thomas's 2002 complaint was that he had been improperly denied benefits as a result of the VA faulty medical treatment. Specifically, Thomas alleged that the VA doctor he saw in 1991 thought it likely that he suffered from schizophrenia, but did not formalize this belief in a final diagnosis. *See id.* at 209, Because Thomas was not technically diagnosed with schizophrenia, the VA ruled him ineligible for certain disability benefits. *See id.* The District Court dismissed the FTCA litigation in 2003, and on appeal, our Circuit Court affirmed dismissal of Thomas's benefit claims by remanded his tort claims. *See id.* at 209-10.

Not surprisingly, Thomas continued the FTCA litigation by filing an amended complaint in 2006. See id. After reviewing his remanded tort claims, however, the District Court dismissed his case on March 20, 2008, *see id.*, and denied to reconsider, *see Thomas v. Nicholson*, 561 F. Supp. 2d 1, 2 (D.D.C 2008). Once again, Thomas appealed, but this time he was unsuccessful because our Circuit affirmed the District Court's ruling under the Federal Torts Claim Act ("FTCA"). *See Thomas v. Shinseki*, No. 08-5349, slip op. at 1-2 (D.C. Cir. May 7, 2009)

In the interim period between filing his amended complaint in the FTCA litigation and challenging its dismissal to the Court of Appeals, Thomas filed this additional suit on March 28, 2007. Even though the FTCA litigation was still pending, Thomas alleged in this new case that the judges involved in the FTCA litigation, along with the Assistant united States Attorneys who defended against it, a VA attorney, the Secretary of the VA, and other VA employees, all conspired to deprive him of his constitutional rights and to commit various torts against him by participating in that case. The judges were dismissed from this case on the grounds that they had an absolute immunity for judicial acts committed with

their jurisdiction. (See Memorandum Order [#38] at 2.[2]). The remaining defendants move in turn to dismiss the balance of plaintiff's case. For the following reasons, their motion is GRANTED.

ANALYSIS

The eight counts in Thomas's Second Amended Complaint can be separated into categories. First, there are the constitutional tort claims alleged in counts One and Two.[3] Second, there are the common law torts alleged in Court Three, Six, Seven, and Eight.

As to the first category, Thomas's constitutional tort claims must be dismissed because the remaining defendants are also immune from them. In general, government officials cannot be sued for constitutional tort damages based on their performance of discretionary functions. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Such immunity is qualified, and government actors who violate clearly established constitutional rights cannot benefit for it. See *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Thus, courts must determine whether a constitutional violation occurred, and if so, whether the right that was violated was clearly established. Courts have discretion to address either of these questions first. *Pearson v. Callahan*, 129 S. t. 808, 818 (2009).

In this case, there is no need to go beyond the first question because has failed to allege any constitutional violation. He attempts to characterize defendants' action as a violation of his constitutional "right to access" the court. Unfortunately, he is mistaken. "To establish a right of access claim, a plaintiff must show that he was hindered in pursuing a cognizable legal claim." *Harrison v. Lappin*, 510 F. Supp. 2d

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[2] Aff'd No. 09-5138 (D.C. Cir. Aug. 19, 2009 (unpublished).

[3] Court Four and Five allege constitutional torts as well, but only against judge-defendants who have already been dismissed; accordingly, those counts are no longer pending.

153, 156 (D.D.C. 2007) (citing *Lewis v. Casey*, 518 U.S. 343, 351 (1996). Simply put, he must show that he "actually lost...[an] otherwise valid legal claim [or] that he is unable to raise such a claim in any other proceeding." *Ali v. District of Columbia*, 278 F.3d 1, 8 (D.C. Cir. 2002). Thomas has not done so here!

Thomas's contention, in essence, is that he was denied access to the courts when the FTCA litigation was dismissed. (Pl. Opp'n at 40.) Thankfully, being unhappy with the outcome of litigation doe not amount to suffering a constitutional violation. Indeed, it would be difficult for Thomas to make the requisite showing - that he lost a valid legal claim - given that our Circuit Court affirmed the dismissal of both his benefits claims and tort claims. Moreover, Thomas neither showed, nor even suggested, that he was somehow prevented from raising valid claims. If anything, the history and procedural posture of his case demonstrate that he has been afforded repeated opportunities to litigate his claims, both at the District and Circuit Court levels, notwithstanding their obvious lack of merit.

As t the second category, Thomas's common law tort claims fare no better. Thomas attempts to sue defendants in their individual capacity for fraud, conspiracy to commit fraud, and intentional infliction of emotional distress. The Department of Justice, however, has certified that all f the defendants acted within the scope of their employment at the time of the conduct alleged in his complaint. (Def. reply at 2.) Accordingly, the defendants are immunized from these claims and Thomas's suit, at best, must be converted into an FTCA action against the United States Government, however, is equally to no avail because Thomas has not exhausted his administrative remedies, as required by 28 U.S.C. § 2675(a). Accordingly, Thomas's FTCA suit against the Government must also be dismissed.

Thus, for all of these reasons, defendant' Motion to Dismiss is GRANTED. An appropriate Order will accompany this Memorandum Opinion.

RICHARD J. LEON
United States District Judge

Article III

Section 1. The judicial power of the United States, shall be vested in the Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;–to all cases affecting ambassadors, other public ministers and consuls;–to all cases of admiralty and maritime jurisdiction;–to controversies to which the United States shall be a party;–to controversies between two or more states;- between a state and citizens of another state;–between citizens of different states;–between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not

committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States, shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attainted.

The Veterans' Judicial Review Act (VJRA) of 1988, 38 U.S.C, § 511(a), which states:

The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. The decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise. 38 U.S.C. § 511(a)

28 U.S.C. § 1346(b)(1), states:

Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. §§ 2671-2680

28 U.S.C. § 2679(d) (1) of The Federal Employees' Liability Reform and Tort Compensation Act of 1988 (the "*Westfall Act*"), 28 U.S.C. § 2679, states:

Upon certification by the Attorney General that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose, any civil action or proceeding commenced upon such claim in a United States district court shall be deemed an action against the United States under the provisions of this title and all references thereto, and the United States shall be substituted as the party defendant.